Wangsa Timber Industries Sdn Bhd & Ors v Adulfast Anthony Robert Ignatia Lee

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S–02–637 OF 1995
NH CHAN, ABU MANSOR AND MOKHTAR SIDIN JJCA
19 SEPTEMBER 2001

Land Law *— Easement — Acquisition by prescription — Common right of way — Whether s 6 of Civil Law Act 1956 prohibits application of common law principles of easement and Prescription Act 1832 — Whether right of way must be registered — Whether easement by presumed grant could only be acquired where both tenements are fee simple — Whether judge erred when he found that respondents had acquired easement of right of way when there was no evidence to support it*

Mr Tam Weng Lim ('Mr Tam') was the owner of two parcels of land which were next and contiguous to each other ('the dominant tenement' and 'the servient tenement' respectively). Mr Tam lived in a house erected on the servient tenement. Sometime in 1965, Mr Tam sold the dominant tenement to his friend, Datuk Chow Chee Seng ('Datuk Chow'). In 1966 Datuk Chow was granted a right of way which was registered on the southern tip of the servient tenement. In 1968, Datuk Chow decided to build a house on the dominant tenement. It was discovered that the dominant tenement was very steep and it was difficult to build an access road on the registered right of way. It was agreed that the road to Mr Tam's house be extended to Datuk Chow's house and this was duly done ('the access road'). This was and is the only road leading to the dominant tenement and Datuk Chow had been using the access road through out. In 1981, Datuk Chow sold the dominant tenement and his house to the respondents. In 1992, the servient tenement was sold to the appellants. The appellants submitted plans to build a three storey detached building which was approved in March 1994. The appellants commenced construction works of the building which caused impediment and obstruction to the access road. The respondents filed an action seeking a declaration that they had acquired an easement of right of way of the access road. The respondents also sought an order that the appellants be restrained from doing acts or deeds that would impede or deny the respondents access to the dominant tenement through the access road. The appellants in their statement of defence denied that the access road was a common right of way and counterclaimed for damages against the respondents for annoyance and obstruction caused to the appellants' workers. The trial judge allowed the respondents' claim and dismissed the appellants' counterclaim. It was held that there were no specific provisions found in respect of easements in the Sabah Land Ordinance and no provision to prevent the application of the English common law principle of easements and the Prescription Act 1832. The appellants appealed. It was submitted that: (i) s 6 of the Civil Law Act 1956 prohibits the application of the common law principles of easement and the Prescription Act 1832;

A (ii) even though the English common law is applicable, that right of way in order to be operative has to be registered; (iii) easement by presumed grant could only be granted and/or acquired where both tenements are fee simple; (iv) the judge erred when he found that the respondents had acquired easement of right of way when there was no evidence to support it.

B

Held, dismissing the appeal:

(1) An easement is not a right or interest in the land but only a right annexed or appurtenant to the land and as such s 6 of the Civil Law Act 1956 is not applicable to the present appeal (see p 446H).

C

(2) The application of the English Registration Act 1925 would in effect displace some of the provisions of the Sabah Land Ordinance and that is not permitted by s 3(1) of the Civil Law Act. For that reason, the English Registration Act 1925 is not applicable to Sabah. The Sabah Land Ordinance (Cap 68) being a modified Torrens system, is not an exhaustive, complete and comprehensive set of land laws in Sabah. The Ordinance does not exclude the reception in appropriate circumstances the English common law, such as easement of right of way without it being registered. Thus the respondent had acquired easement of right of way in respect of the access road even though it was not registered (see p 449D–F).

D

E

(3) The acquisition of an easement is not limited to fee simple tenements. An easement could be acquired where one or both tenements are leaseholds as in the present appeal (see p 452E–F).

(4) On the evidence as found in the record of appeal, the judge came to the correct conclusion when he stated that the respondents had acquired easement of right of way in respect of the access road. The respondents had established long usage in respect of the access road. That being the case, under common law the respondents were entitled to claim easement in respect of the access road because there are no provisions in respect of easement under the Sabah Land Ordinance. The appellants could not deprive the respondents of that right (see pp 455F, 457B–C).

F

G

[Bahasa Malaysia summary

H Encik Tam Weng Lim ('En Tam') merupakan tuanpunya dua bidang tanah yang di sebelah dan berjiranan antara satu sama lain ('tenemen dominan' dan tenemen 'servient', masing-masing). Encik Tam mendiami sebuah rumah yang didirikan atas tenemen 'servient'. Pada tahun 1965, En Tam telah menjual tenemen dominan kepada rakannya, Datuk Chow Chee Seng ('Datuk Chow'). Pada tahun

I 1966, Datuk Chow telah diberikan hak laluan yang didaftarkan pada bahagian selatan tenemen 'servient'. Pada tahun 1968, Datuk Chow mengambil keputusan mendirikan sebuah rumah pada tenemen

dominan. Adalah didapati bahawa tenemen dominan adalah amat curam dan sukar untuk membina jalan laluan di hak laluan berdaftar. Adalah disetujui bahawa jalan ke rumah En Tam diteruskan ke rumah Datuk Chow dan ini telah dilaksanakan dengan sewajarnya ('jalan laluan tersebut'). Ini merupakan satu-satunya jalan yang membawa ke tenemen dominan dan Datuk Chow telah menggunakan jalan laluan tersebut selama ini. Pada tahun 1981, Datuk Chow menjual tenemen dominan dan rumahnya kepada penentang-penentang. Pada tahun 1992 tenemen 'servient' dijual kepada perayu-perayu. Perayu-perayu telah menyerahkan pelan-pelan untuk membina sebuah bangunan tiga tingkat yang diluluskan pada bulan Mac 1994. Perayu-perayu memulakan kerja pembinaan bangunan tersebut yang menyebabkan halangan dan kesulitan kepada jalan laluan. Penentang-penentang memfailkan satu tindakan memohon perisytiharan bahawa mereka telah memperolehi satu 'easement' hak laluan ke atas jalan laluan tersebut. Penentang-penentang juga memohon satu perintah agar perayu-perayu dicegah daripada melakukan sesuatu yang menghalang atau tidak memberi penentang-penentang akses kepada tenemen dominan melalui jalan laluan tersebut. Dalam penyata pembelaan mereka, perayu-perayu menafikan jalan laluan tersebut merupakan hak laluan bersama dan menuntut balas ganti rugi terhadap penentang-penentang untuk ketidakselesaan dan halangan yang diakibatkan kepada para pekerja perayu-perayu. Hakim perbicaraan membenarkan tuntutan penentang-penentang dan menolak tuntutan balas perayu-perayu. Ia diputuskan bahawa tiada peruntukan khusus mengenai 'easement' dalam Ordinan Tanah Sabah dan tiada peruntukan untuk menghalang pemakaian prinsip 'easement' common law dan Akta Preskripsi 1832. Perayu-perayu mengemukakan rayuan. Adalah dihujahkan bahawa: (i) s 6 Akta Undang-Undang Sivil 1956 melarang pemakaian prinsip 'easement' dan Akta Preskripsi 1832; (ii) walaupun common law Inggeris terpakai, hak laluan itu hendaklah didaftarkan supaya mengambil kesan; (iii) 'easement' oleh pemberian anggapan hanya boleh diberikan dan/atau diperolehi di mana kedua-dua tenemen adalah 'fee simple'; (iv) hakim terkhilaf apabila beliau mendapati bahawa penentang-penentang telah memperolehi 'easement' hak laluan walhal tiada keterangan untuk menyokongnya.

Diputuskan, menolak rayuan tersebut:

(1) Suatu 'easement' bukanlah hak atau kepentingan dalam tanah tetapi hanya hak yang ditambah atau sampingan kepada tanah tersebut dan dengan itu s 6 Akta Undang-Undang Sivil 1956 tidak terpakai kepada rayuan ini (lihat ms 446H).

(2) Pemakaian Akta Pendaftaran Inggeris 1925 akan memberi kesan mengganti beberapa peruntukan Ordinan Tanah Sabah dan ini tidak dibenarkan oleh s 3(1) Akta Undang-Undang Sivil. Atas sebab ini, Akta Pendaftaran Inggeris 1925 tidak terpakai kepada Sabah. Ordinan Tanah Sabah (Bab 68), yang merupakan satu

sistem Torrens yang telah dipinda, bukanlah satu set undang-undang tanah yang amat teliti, lengkap dan menyeluruh di Sabah. Ordinan tersebut tidak mengecualikan penerimaan common law Inggeris dalam keadaan yang wajar, misalnya 'easement' hak laluan tanpa mendaftarkannya. Justeru itu penentang telah memperolehi 'easement' hak laluan berkaitan dengan jalan laluan tersebut walaupun ia tidak didaftarkan (lihat ms 449D–F).

(3) Pemerolehan 'easement' tidak terhad kepada tenemen 'fee simple'. Suatu 'easement' boleh didapati di mana satu atau dua tenemen merupakan pegangan pajakan seperti dalam rayuan ini (lihat ms 452E–F).

(4) Atas keterangan seperti yang didapati pada rekod rayuan, hakim mencapai kesimpulan yang betul apabila beliau menyatakan bahawa penentang-penentang telah memperolehi 'easement' hak laluan berhubung dengan jalan laluan tersebut. Penentang-penentang telah membuktikan penggunaan lama ke atas jalan laluan tersebut. Oleh yang demikian, di bawah common law penentang-penentang berhak menuntut 'easement' berhubung dengan jalan laluan tersebut kerana tiada peruntukan mengenai 'easement' di bawah Ordinan Tanah Sabah. Perayu-perayu tidak boleh melucuthak penentang-penentang daripada hak itu (lihat ms 455F, 457B–C).]

Notes

For cases on easement generally, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2348–2410.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)

Ohna Mohamed Abubakar v Tho Yan Poh & Ors 13 SSLR 39 (refd)

Legislation referred to

Civil Law Act 1956 ss 3(1), 6

National Land Code 1965 ss 282, 283, 284, 285, 286, 287, 288, 289, 290, 291

Land Registration Act 1925 [Eng]

Prescription Act 1832

Sabah Land Ordinance (Cap 6) s 31(1)(d)

Sarawak Land Code (Cap 81) ss 132, 137, 141

Appeal from: Suit No K22–178 of 1994 (High Court, Kota Kinabalu)

Marina Tiu (*Yap Chin & Tiu*) for the appellants.

Clement Skinner (*Skinner Lind Willie Wong & Chin*) for the respondents.

Mokhtar Sidin JCA (delivering judgment of the court): . We have dismissed this appeal earlier. Now we give our reasons for doing so.

In this appeal, land held under title CL 015276418 ('the dominant tenement') and land held under title CL 015276409 (hereinafter referred to as 'the servient tenement') prior to 1965 belonged to one Mr Tam Weng Lim. Both parcels of land were next and contiguous to each other. Before 1965, the dominant tenement was vacant while there was a house erected on the servient tenement where Mr Tam Weng Lim lived. Sometime in 1965, Mr Tam Weng Lim sold the dominant tenement to his friend, Datuk Chow Chee Seng. In 1966, Datuk Chow Chee Seng was granted a right of way over the servient tenement to the dominant tenement. The right of way measured some 25 links by 30 links and it is registered on the southern eastern tip of the servient tenement. In 1968, Datuk Chow Chee Seng decided to build a house on the dominant tenement. For that purpose Mr Tam Weng Lim was engaged by Datuk Chow Chee Seng as the supervisor. When the house was to be built it was discovered that the dominant tenement was very steep and it was difficult to build an access road 'on the registered right of way. Datuk Chow Chee Seng agreed to the suggestion by Mr Tam Weng Lim that the road to Mr Tam's house be extended to Datuk Chow's house and this was duly done ('the access road'). This was and is the only road leading to the dominant tenement and Datuk Chow had been using the access road throughout. Datuk Chow gave evidence that he did not ask anybody's permission nor did he pay anybody for the use of the access road. In other words nobody interfered with his usage of the access road. In 1981, Datuk Chow sold the dominant tenement and his house to Adulfast Anthony Robert and his wife, Mdm Ignatia Lee @ Lee Siew Fong, the first and second respondents in the present appeal. Datuk Chow also gave evidence that as Mr Tam was an old friend of his, he did not bother to register the access road to be a right of way nor did he enter into a formal agreement with Mr Tam for the usage of the access road. Mr Tam confirmed this and further stated that whoever owns the dominant tenement and the house thereon will also have the right to use the access road.

As stated earlier, the respondents bought the dominant tenement with the house sometime in 1981. The first respondent gave evidence that all the time he was using the access road to go to his house. The first respondent also gave evidence that sometime in 1987 he applied to join the Business Migration Programme offered by the Australian Government and in late 1987 he and his family were given the approval to do so. He then left for Australia but his wife stayed back in Sabah. The first respondent, his wife and children commuted regularly to Australia and back. It was not disputed that whenever they were in Sabah they stayed at the same house which is on the dominant tenement. Sometime in 1993, the respondents rented out part of the house to one Mrs Soon but they retained the use of the master bedroom, another room and part of the kitchen. Sometime in 1994, the first respondent came back to Sabah and he went back to stay in the house and the renting out was stopped. It is not disputed that when the respondents bought the house from Datuk Chow there was already a garden in existence

and that garden encroached part of the servient tenement. The respondents built a garage and an annexe on the registered road reserve.

In the meantime, Mr Tam sold the servient tenement to one Datuk Frederick Jinu and in the middle of 1992 the said Datuk Frederick Jinu in turn sold the servient tenement and the house on it to the first appellant. Sometime in 1994, the servient tenement was transferred into the names of the second, third and fourth appellants. At the time when the first appellant bought the servient tenement in 1992 the second appellant was the managing director of the first appellant. The first appellant knew that there was a right of way registered on the title when it bought the servient tenement. The first appellant also knew of the existence of the access road but was not bothered about it because the access road was outside the servient tenement's fence and was of the view that the access road was not part of the servient tenement since it served both the servient tenement and the dominant tenement. Sometime in 1994, the appellants submitted plans to the Majlis Perbandaran Kota Kinabalu to build a three storey detached building which were approved on 28 March 1994. After a search was made the appellants then discovered that the access road was on the servient tenement. It was apparent from the approved plans that the construction of the building would affect the access road since part of the building would be built on the access road. Realising that if the building is allowed to be built in accordance with the approved plan, the respondents will have no access road to their house on the dominant tenement. The respondents wrote a letter dated 9 August 1994 to the Setiausaha Hasil Bumi, Sabah, applying for an alternative right of way under s 31 of the Land Ordinance (Sabah Cap 68). There was no reply to that letter. In the meantime, the appellants commenced construction works of the building. The construction works caused impediment and obstruction to the access road.

On 23 March 1994, the respondents' former solicitors wrote to the appellants' architect pointing out that the access road (which the respondents claimed to be the common right of way) had been impeded and obstructed. There was also no consent from the relevant authorities. Following a meeting with the President of the Majlis Perbandaran Kota Kinabalu on 19 May 1994, the respondents wrote to the President of the Majlis Perbandaran Kota Kinabalu stating the access road had been barricaded. The appellants were then instructed by the President to remove the barricade which the appellants duly complied. The respondents then wrote to the appellants' architect requesting for a copy of the approved building plans and any insurance coverage, if any, against third party damages. The appellants' architect ignored the request. On 7 July 1994, the respondents gave notice to the appellants' architect to instruct the contractor to cease demolition and construction works on the servient tenement until approval for such works had been obtained from the Majlis Perbandaran Kota Kinabalu. In early November 1994, the respondents received a letter from the appellants' solicitors giving notice that the respondents should confine themselves to the registered right of way. On 12 September 1994, both Datuk Chow and Mr Tam, the original owners of the dominant tenement and the servient tenement respectively,

wrote to the Director of Land and Survey, Kota Kinabalu explaining why a right of way could not be constructed on the registered right of way. It was explained that the contour of the dominant tenement was such that it was almost impossible to build a road on the registered right of way. In the meantime, the appellants' solicitors, by a letter, threatened to demolish the access road. On receiving that letter, the respondents went to the Engineering Department of the Majlis Perbandaran Kota Kinabalu, when for the first time the respondents were given copies of the approved plans.

The respondents then filed the present action in the High Court, Kota Kinabalu seeking a declaration that the respondents had acquired an easement of right of way of the access road including the stretch on the appellants' land (the servient tenement). The respondents also seek an order that the appellants whether by themselves, their servants, agents or otherwise, be restrained from doing acts or deeds that would impede or deny the respondents access to the dominant tenement through the access road or doing any act to damage the access road. The respondents also prayed for an order that the appellants, whether by themselves, their servants or agents or otherwise, do restore the access road which had been demolished on the servient tenement in order to allow vehicular access to the dominant tenement. In addition, the respondents prayed for damages for the disturbances of the respondents' enjoyment of the access road.

The appellants in their statement of defence denied that the access road was a common right of way. Appellants claimed that the right of way was the one registered with the Central Land Registrar under Memorial No 87163. The appellants also denied any knowledge that the registered right of way could not be constructed because of the contour of the dominant tenement. The appellants further denied that the respondents had acquired an easement of right of way in respect of the access road whether by express or implied grant or by lost modern grant by presumption through long use or by virtue of the provision of the Prescription Act 1832 on the ground that those were not available with the passing of ss 3(1) and 6 of the Civil Law Act 1956 ('the Act') and the Sabah Land Ordinance (Cap 6) ('the Ordinance'). The statement of defence further stated that from 1982 onwards the respondents' enjoyment of easement of the access road was on a mistaken belief. It was also stated that if there was any easement it was extinguished by alteration in the use of such easement. The use of the access road by the respondents, if any, was only by licence which the appellants were entitled to revoke at any time. The appellants further stated that the respondents, at all material times, knew that the access road was on the servient tenement. In carrying out the demolition of the existing building and the construction of the three storey building, the appellants were only exercising their rights as owners of the servient tenement. Appellants further stated that even if the respondents had a right of way by easement the respondents lost it when the appellants failed to register or lodge a caveat and the appellants as a bona fide purchaser of the servient tenement had no notice of any encumbrances on the title.

The appellants counterclaimed for damages against the respondents for annoyance and obstruction caused to the appellants' workers when the

respondents and their friends parked their cars at the entrance to the servient tenement and refusing to remove them when requested to do so. The obstruction caused great hardships and inconveniences to the appellants, their agents or servants in that it prevented and/or hindered the delivery of building materials to the site. Further, the appellants claimed that the respondents had committed trespass when part of the garden belonging to the respondents encroached on the servient tenement. The appellants in their counterclaim prayed for a declaration that they are entitled to the exclusive possession, use and enjoyment of the servient tenement. The appellants also prayed for a declaration that the right of way to the dominant tenement be confined to the registered right of way. The appellants also seek an order to compel the respondents by themselves, their agents or servants to cease and to remove the trespass and also an injunction restraining the respondents, their agents or servants from trespassing.

Application of the English common law to Sabah

The learned trial judge in the court below allowed the respondents' claim and dismissed the appellants' counterclaim. In his judgment the learned Judge took the view that the respondents are entitled to the easement of right of way of the access road. The learned Judge is of the opinion that there were no specific provisions found in respect of easements in the Sabah Land Ordinance. Sections 282 to 291 of the National Land Code 1965 ('the NLC') deal specifically with easements but that code is not applicable to Sabah. The Sarawak Land Code (Cap 81) ('the Code') which is also not applicable to Sabah have specific provisions in respect of easements (ss 132, 137 and 141 of the Code). Since the NLC and the Code have specific provisions in respect of easements, the English common law, rules and equity are not applicable to those statutes. That is not the case in respect of the State of Sabah. The State of Sabah is totally on different footing because there were no provision in respect of easement in the Ordinance. The nearest to this is s 31(1)(d) of the Ordinance which provides as follows:

> Every title shall, by virtue of this Ordinance, be subject, in the absence of an express provision to the contrary, to the following implied conditions in respect of the land contained therein:
>
> (d) any owner of country land, whether his title be of a date prior or subsequent to the commencement of this Ordinance, may apply to the Collector of the district in which his land is situate for a right of way from his land over any other alienated country land to the nearest public road to a river or foreshore, or for permission to construct a drain or irrigation channel across such land, and the Collector shall deal with the application in the manner prescribed.

It was contended by the learned counsel for the respondents that this section is only applicable to parcel of land which is landlocked and not otherwise. In the present appeal the dominant tenement is not landlocked but due to the contour and features of the land no road could be constructed to the dominant tenement except at the place where the access road is now situated. The learned judge in his judgment agreed with the

contention of the learned counsels for the respondents. He is of the view that s 31(l)(d) of the Ordinance deals with specific type of situation which is as stated in that section. The dominant tenement is not one of the specific case falling within that section. The learned Judge then concluded that there are no local circumstances prevailing in Sabah to prevent the application of the English common principle of easements and the Prescription Act 1832 to Sabah. Section 3(1)(b) of the Act provides for such an application when it states:

> Application of UK common law, rules of equity and certain statutes
>
> (1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall:
>
> …
>
> (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the first day of December 1951;
>
> …
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

The learned judge then went on to say that since there are no provision in the Ordinance to prevent the application of the English common law, rules of equity and the Prescription Act to Sabah, the respondents can claim an easement of right of way in respect of the access road under the English common law principles of easement and the Prescription Act.

Before us, the learned counsel for the appellants went at great length to show that the learned trial judge had erred in coming to the above conclusion. In her submission, the learned counsel contended that s 6 of the Act prohibits the application of the common law principles of easement and the Prescription Act 1832. Section 6 of the Act provides:

> Immovable property
>
> Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

The learned counsel went on to submit that s 6 of the Act specifically prohibits the application of the English law in cases of right or interest on land. Easement of right of way being a right or interest in land and as such s 6 of the Act prevents the application of the English law.

On the other hand, the learned counsel for the respondents contended that an easement is not a right or interest in the land but only a right annexed or appurtenant to the land and as such s 6 of the Act is not applicable to the present appeal. The learned trial judge favoured the respondents' argument. We see no reason to differ from the learned judge's view.

Whether an easement of right of way had to be registered

It was also contended by the learned counsel for the appellants that even though the learned judge came to the conclusion that the English common law is applicable in respect of easement of right of way to Sabah, that right of way in order to be operative has to be registered. For that reason, it was contended by the appellants that the learned trial Judge did not appreciate the requirement of s 88 of the Sabah Land Ordinance. The answer to that argument is found in the Federal Court's decision of *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 where Wylie CJ (Borneo) at p 206 said:

> Section 88 of the Land Ordinance reads as follow:
>
> > 'No new title and no dealing with, claim to or interest in any land except, land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part.'
>
> Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered. The language employed is somewhat different from that used in the majority of systems in use in the Commonwealth. The usual provision is to the effect that no instrument shall be effectual to pass any interest in land without registration and that, upon registration, the interest shall pass. See s 27 of the Land Titles Ordinance 1956, of Singapore for an illustration, and also the reference to the number of jurisdictions in which this provision exists set out in p 116 of *Hogg's Registration of Title to Land Throughout the Empire*. In nearly all jurisdictions, however, notwithstanding variations in the language used, it has been held that these provisions do not render unenforceable contracts or agreements which would lead up to the execution and registration of instruments. Even the unregistered instrument itself may give a title in equity and an equitable right to enforce the agreement which must have existed between the parties when the instrument was executed. See *Abigail v Lapin* [1934] AC 491. Section 4 of the Selangor Registration of Titles Regulation 1891, employed what is probably the most sweeping language used in these provisions. That section provided that land comprised in a grant shall not be capable of being dealt with except in accordance with the statutory provisions and that 'any attempt' to deal with land except in this manner 'shall be null and void and of none effect'. Nevertheless, in *Haji Abdul Rahman v Mohamed Hassan* [1917] AC 209; 1 FMSLR 290, the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while 'valueless as a transfer or burdening instrument,' (p 215) was good as a contract. It was said that it was not an 'attempt to transfer, but a conditional promise to transfer.' (p 214).
>
> The language of s 88 is not nearly as sweeping as that of the Selangor provision. Moreover, its effect is confined to a new title or a dealing with, claim to, or interest in land. Following the foregoing authorities, and others too numerous to mention, in my judgment s 88 does not affect contracts or agreements otherwise valid and enforceable. As was pointed out in *Abigail's* case (p 500), the provision for protection of unregistered interests by caveats shows that the legislation does not attempt to render all unregistered interests non-existent. What it does, is to prohibit the acquisition of a legal estate or

interest in land except by registration of an instrument in the statutory form. Section 116 of the Land Ordinance of Sabah makes the usual provision for caveats which may be registered 'by any person claiming to be entitled to any interest' in any land. Obviously, such a provision is inconsistent with any interpretation of s 88 which involves holding that any agreements or other documents affecting land are of no effect and that only registration of the dealing in the land is to have legal validity at all.

This decision was followed in *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12.

At pp 24–26, Edgar Joseph Jr FCJ said:

Nowhere in the Land Ordinance is there any provision conferring indefeasibility of title to or interests in land which is a feature of central importance to the Torrens system of land registration. This is to be contrasted with the position in Peninsular Malaysia and Sarawak, where there are express provisions conferring such indefeasibility (see ss 92(1) and s 340 of the National Land Code 1965 and s l31 of the Sarawak Land Code (Cap 81) respectively). Moreover, in Sabah unlike Peninsular Malaysia and Sarawak, in appropriate circumstances the doctrine of adverse possession may be invoked against private owners of land (see s 6 of the Sabah Land Ordinance (Cap 68) which merely bars any claim to any right, title or interest in state land only based on adverse possession thereof).

Nevertheless, in *Chua Chee Hung & Ors v QBE Supreme Insurance Bhd* [1990] 1 MLJ 480, the Supreme Court, speaking through Lee Hun Hoe CJ, said (at p 484) though without discussion:

'In our view, since the Sabah Land Ordinance (Cap 68) and the National Land Code 1965 are modelled on the Torrens system, the vendor/trustee relationship aplicable in Peninsular Malaysia should be equally applicable in Sabah …'

Similarly, in the earlier case of *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200, the old Federal Court, which comprised Thomson LP, Wee Chong Jin CJ (Singapore) and Wylie CJ (Borneo), at a time when our apex court was still the Privy Council, expressed the view that the Land Ordinance provides for a modified Torrens system of land registration. This is how Wylie CJ (Borneo), speaking for the court, put it (at p 206) ... .

The learned judge then went on to cite the passage I have cited above. At p 26, his Lordship continued:

With respect, we are unable to agree with Lee Hun Hoe CJ (Borneo) when he said in *Chua Chee Hung* that the Land Ordinance, like the National Land Code, is modelled on the Torrens system. We say so because, unlike the National Land Code, there is no provision in the Land Ordinance conferring indefeasibility of title or interests in land on registration which is a feature of central importance to the Torrens system of land registration.

However, s 88 which emphasizes the paramount importance of registration in accordance with Pt V of the Land Ordinance as a condition precedent for the recognition of the validity of title or dealing or claim to or interest in any land (except land still held under native customary tenure without documentary title) does, in our view, imply the basic Torrens concept that title to or interest in land vests and divests only upon registration. Moreover, the provisions of s 116 of the Land Ordinance regarding the role of

A the caveat in giving notice of claim against the registered title point to the same conclusion. We therefore agree with the view of the old Federal Court, speaking through Wylie CJ (Borneo) in *Lin Nyuk Chan*, that the Sabah Land Ordinance (Cap 68) provides for a modified Torrens system of land registration.

In our view, the correct approach to adopt in considering the priority B dispute in this appeal is to apply general law priority rules, not forgetting s 88 of the Land Ordinance and the concept of the bare trust doctrine in a vendor/purchaser situation.

It was also contended by the learned counsel for the appellants that since the learned judge came to the conclusion that the English common law C applies to Sabah in respect of easements it should follow that the English Land Registration Act 1925 is also applicable to Sabah. As such there is a requirement that the easement has to be registered.

It is clear to us that the Ordinance provides for registration in respect of certain matters relating to rights and interests on land. Even though s 3(1) of the Act provides the application of the established common law D principles, it prohibits the application of English statutory laws when there are provisions in the Ordinance. In our view, the application of the English Registration Act 1925 would in effect displace some of the provisions of the Ordinance and that is not permitted by s 3(1) of the Act. For that reason, we agree with the learned judge that the English Registration Act 1925 is not applicable to Sabah. E

For the above reasons, we are in agreement with the submission of the learned counsel for the respondents that the Ordinance, being a modified Torrens system, is not an exhaustive, complete and comprehensive set of land laws in Sabah. It is clear to us that the Ordinance does not exclude the reception in appropriate circumstances the English common law, such as F easement of right of way without it being registered. We are of the view that the learned judge came to the right conclusion when he decided that the respondents have acquired easement of right of way in respect of the access road even though it was not registered.

G *Easement could only be acquired in respect of fee simple in both tenements and not otherwise*

Learned counsel for the appellants also contended that easement by presumed grant could only be granted and/or acquired where both tenements are fee simple. It could not be granted and/or acquired where H both tenements or either one of the tenements is leasehold. It was submitted by the learned counsel that both the dominant tenement and the servient tenement in the present appeal are leaseholds and for that reason the learned judge came to the wrong conclusion when he stated in his judgment the following:

I I reject this contention because the proviso to s 3(1) of the Act reads: 'Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as circumstances of the States of Malaysia and their respective inhabitants permit and subject to such

qualifications as local circumstances render necessary.' Under this proviso the court can adopt the common law to suit the local circumstances. Here the lease is a 999 years lease. The presumed intention of Mr Tam Weng Lim and PW2 at the time of the commencement of the user is to create an easement of right of way for the duration of the dominant tenement.

The issue before us is whether the learned judge came to the wrong conclusion in respect of this. The answer to this is provided for by Bucknill CJ in *Ohna Mohamed Abubakar v Tho Yan Poh & Ors* 13 SSLR 39 where at p 43 he said:

> The plaintiff's position is that he is entitled to the benefit of an easement or right acquired by the fact that the house of which he is the tenant had enjoyed support by the land immediately adjoining the party-wall for a period of over 20 years.
>
> In a consideration of this question various points necessarily arise and it will clear the position if the following facts which were admitted by counsel at the Bar are here stated. These facts are as follows:
>
> 1 That all the land in question belonged originally and still belongs to the Crown.
>
> 2 That the land on which house No 101 South Bridge Road now stands was the subject of a Government lease for 999 years (No 1644) dated the 21 December 1866 granted to a certain person named John James Greenshields.
>
> 3 That the land on which house No 102 South Bridge Road now stands was the subject of a Government lease for 999 years (No 1645) dated 21 December 1866 granted to the same John James Greenshields.
>
> 4 That the lease No 1644 was assigned on 22 January 1867 by JJ Greenshields to one Pakiri.
>
> 5 That lease No 1645 was assigned on 28 February 1867 by JJ Greenshields to one Nagalingan.
>
> 6 That it is not known exactly when the house on the land the subject of lease No 1644 was erected.
>
> 7 That it is not known when the house on the land subject to lease 1645 was erected but it is admitted that it was erected more than 20 years before the occurrences which formed the subject matter of this suit.
>
> 8 That the plaintiff was at the time when the house fell down a monthly tenant of No 102 South Bridge Road and that he had occupied the premises in question for about six or seven years.
>
> 9 That the first and second defendants were at the time when house No 102 fell down the assignees of lease No 1644 (ie No 101 South Bridge Road) and that the premises were unoccupied by a tenant at the time when they fell.
>
> It is admitted that in English law, on the basis laid down in the well-known case of *Angus v Dalton* (1), if A owns a plot of land adjoining another plot of land owned by B, and if A erects a house on his own plot of land, he (A) after twenty years acquires a right to whatever support the land of B gives to his house, and that if B by excavating his (B's) land causes A's house to fall B is liable to A for damages, as are also contractors who carry out the work which results in the damage. In other words, firstly a right to lateral support from

adjoining land may be acquired by twenty years' uninterrupted enjoyment for a building proved to have been built at the beginning of that term, and secondly it is so acquired if the enjoyment is peaceable and without deception or concealment and so open that it is known that some support is being enjoyed by the building.

In this case now before this court, the second of these axioms does not concern us, the enjoyment being obviously peaceable, and without deception or concealment.

Further down at p 45, his Lordship said:

It may here be noted conveniently that the Prescription Act of 1832 (2 & 3 Will IV c 71) does not apply here, but that this important principle of English law laid down in *Angus v Dalton* should be in the main applied in this Colony, such principle being separated so clearly from any form of (locally inapplicable) statutory prescription, there is, I can think, no reason to doubt.

A principle such as this, founded as it is on the common law of England, on convenience, on reasonable grounds and on equity is one of which granted all reservations of local peculiarities — one need not fear that the local adoption would be attended here with hardship or impropriety.

This being my view, it remains to be considered how far certain factors which somewhat differentiate this case from those in the suit in which the broad principle laid down in *Angus v Dalton* were enunciated, affect the rights of the parties to the present cause.

These factors may be reduced to the following points:

(a) Does the fact that the ultimate reversioner is the same persona (ie the Crown) affect the position?

(b) Does it matter that in the case of both these plots of land the leases originally granted have been the subject of various assignments?

(c) Is a temporary tenant entitled to claim in his own right and separably from the right, if any, of his landlord, damages in respect of his own loss?

The technical difficulty surrounding the first of these questions is one of some academic nicety.

At pp 46 and 47 His Lordship said:

The sound underlying principle which I mention may be thus expressed: it is an essential feature of an easement that there should be a dominant and a servient tenement and consequently that as a rule the *owner* of the dominant tenement and the *owner* of the servient tenement must be different persons, it being impossible for an individual to have or to acquire an easement over his own land, for the reasons that everything which a person does on his own land must naturally be done as owner.

But this principle is subject to exceptions well laid down by law; firstly, it does not necessarily hold good in connection at any rate with certain kinds of easements, such as that class known as easements of necessity, where the dominant owner has an estate of interest *only in reversion or reminder* in the servient tenement, and, *a fortiori*, still less does it necessarily hold good in respect either of the same class, or the reciprocal class, of easements, where the actual owner of both dominant and servient tenements has only a reversionary estate or interest in *both* tenements. And secondly, one may add this further proposition of exception, namely that in the case of reciprocal

easements, in which for example houses are so constructed as to be mutually dependent on each other, there would appear to be nothing to prevent a tenant of one tenement acquiring an easement against a tenant of another tenement, even when both tenements are held under and from the same landlord. A

It is not contended by the plaintiff here that we are concerned at all with an easement of necessity, and any consideration of this category of right may therefore be dismissed; and again, how far such an acquisition of an easement of the reciprocal character is commensurate, or co-terminous, with the dominant or servient tenement's tenant's terms, or how far such an acquisition binds or affects the common reversioner, are matters into which it does not seem to me material here to inquire; and I will only say in passing that if one admits at all that one should pay any regard to the circumstances under which the leases in respect of these two plots of land were granted and now stand, one may point out that the Crown was the original owner and granted originally leases for 999 years, a small fraction only of which term has expired; that this tenure is locally as closely approximate to freehold as may, save in certain circumstances, be hereby obtained; that although at one time the leases were held by the same person they have long ago passed into separate and different hands; and finally that, save in the case of entirely different freehold ownership, it is difficult to imagine a broader separation in title than exists in the case of these two plots or in which any easement; if capable of acquisition by the leaseholder of one plot against the leaseholder of the other, has practically less connection with the ultimate reversioner. B C D

For the above reasons therefore I am of the opinion that the fact that the Crown has an ultimate reversionary interest in both of these tenements does not prevent the acquisition by the tenant of one of the tenements of an easement over the other tenement. E

From the above, it is clear to us that the acquisition of an easement is not limited to fee simple (what is known here as freehold) tenements. An easement could be acquired where one or both tenements are leaseholds. In the present appeal, it is common ground that both tenements are leasehold for 999 years with reversioner to the State. Both the appellants and the respondents are the holders of the leasehold in respect of the servient and dominant tenements respectively and not the tenants. For that reason, we found that the learned judge have come to the correct conclusion. F G

Evidence of easements

It was also contended by the learned counsel for the appellants that the learned judge had erred when he found that the respondents had acquired easement of right of way in the present appeal when there was no evidence to support it. It is most appropriate at this stage to cite the judgment of the learned trial Judge in respect of his finding on easement. The learned trial judge in his judgment said: H

In *Tam Kam Cheong v Stephen Leong Kon Sang & Anor* [1980] 1 MLJ 36, his Lordship Salleh Abas FJ (as he then was) [delivering the judgment of the Federal Court] at pp 38–39 said: I

'For the claim of easement to be established, every easement must possess four characteristics, ie:

(1) there must be a dominant and servient tenement;

(2) an easement must accommodate the dominant tenement, ie appurtenant to it and connected with the normal enjoyment of the dominant tenement;

(3) dominant and servient owners must be different persons; and

(4) an easement must be of such status as can be the subject matter of a grant, ie its nature and extent should be capable of exact description.'

After stating the principles the learned trial judge then went on to say:

(a) there is a dominant and a servient tenement.

PW1 has stated in evidence that he and his wife bought a parcel of land held under title CL 015276418 from PW2 in 1981. This parcel of land is next to and contiguous with a parcel of land held under title CL 015276409 and now owned by the second, third and fourth defendants. PW1 has testified that to gain access to his land and the house erected thereon he uses a driveway which is situated on and passes over the defendants land ('the common driveway'). Without using this common driveway access to the plaintiffs land would not be possible. It is obvious that the common driveway situated on the land of the defendants is to accommodate the usage of the plaintiffs land. I agree with the submission of learned counsel for the Plaintiff that by virtue of this fact the plaintiffs land to which the easement is appurtenant is called the 'dominant tenement' and the land of the defendants over which the easement is exercisable is called the 'servient tenement.'

(b) an easement must accommodate the dominant tenement.

AB55 and 56 shows Lot 4 as the servient tenement and Lot 5 as the dominant tenement and the contour lines that clearly show that there is a height difference of about 40 feet between the dominant and servient tenements. This height difference of the dominant tenement is also confirmed by DW6.

The common driveway has since 1968 been used for the purpose of gaining access to the dominant tenement. This is the only vehicular access to the dominant tenement. The right to use the common driveway was therefore to accommodate the dominant tenement.

(c) Dominant and servient owners must be different persons.

PW2 has testified that in 1965 both the dominant and servient tenements belonged to Tam Weng Lim. PW2 bought the dominant tenement from Tam Weng Lim and it was transferred to PW2 on or about 29 December 1965.

The right to pass and repass over the common driveway only began in 1968. When the right of way was being exercised by PW2 from 1968 onwards the dominant and servient owners were two different persons. PW2 sold the dominant tenement to PW1 in 1981. According to AB10, Tam Weng Lim transferred the servient tenement to one Liu Kai in 1978 and in 1983 Liu Kai transferred the servient tenement to one Frederick Jinu who in 1992 transferred the servient tenement to the first defendant who in 1994 transferred the servient tenement to the second, third and fourth defendants.

Thus this separate identities of ownership has continued in the case both of the dominant and servient tenement till today.

(d) A right over land cannot amount to an easement unless it is capable of forming the subject matter of a grant.

PW2 has testified that Tam Weng Lim the owner of the servient tenement had granted him the right to use the common driveway as access to the dominant tenement to pass and repass with vehicles. PW2 has also stated that there was no limitation imposed on his right to use the common driveway and as far as he was concerned that right could be exercised for as long as the term of the dominant tenement lasted.

The extent of the right is definite and capable of forming the subject matter of a grant.

The learned counsel for the plaintiffs submitted that they have acquired the easement through the doctrine known in English common law as the Lost Modern Grant and/or alternatively under the Prescription Act 1832 of England.

In support he cited *Cheshire's The Modern Law of Real Property* (9th Ed) at p 475.

'After actual enjoyment of an easement has been shown for a reasonable length of time the court presumes that an actual grant was made at the time when the enjoyment began, but that the deed has been lost.' He also cited the case of *Bryant v Foot* (1867) LR 20 B 161.

Under the doctrine of *Lost Modern Grant* the courts are prepared to hold that an easement has been acquired circumstances: to hold that an in the following:

(i) as a general rule 20 years enjoyment is enough to raise the presumption;

(ii) the user is as of right;

(iii) the user must be continuous.

The learned counsel for the plaintiff submitted that at common law in England once an easement is created or acquired, the person acquiring the easement can enforce it against anybody who comes to the servient tenement whether as a purchaser, lessee or squatter and whether with or without notice (see *Leech v Schweder* 1874 LR 9 Cl App 463 at p 474).

…

From the evidence adduced, I find that the has been from 1968 onwards. And the user has continued until the present day by PW1 and family until the user was interrupted by the actions of the defendants in excavating the common driveway. I am of the view that the owners of the dominant tenement have been using the common driveway that runs through the servient tenement for some 25 years now.

I find that the user is of right. For PW1 and PW2 have stated in evidence that they did not have to ask anyone's permission to use the common driveway. PW1 has also stated that he has not been prevented by anyone to use the common driveway. PW2 has testified that there was no restrictions imposed by Tam Weng Lim in respect of the user.

I find that there is no evidence adduced to show that either PW2 or PW1 had to ask the permission of any of the successive owners of the servient tenement to use the common driveway.

The law also requires that the user should not be violent in that the dominant owner has not used coercion.

Both PW1 and PW2 did not have to use force in order to use the common driveway. Here the user was not secret. The user was open in full

view of every owner for the time being of the servient tenement by the use of vehicles to pass and repass along the common driveway. Lastly both PW1 and PW2 have testified that they did not have to pay anyone for the use of the common driveway.

The learned counsel for the plaintiffs submitted that by s 2 of the Prescription Act 1832 a right of way enjoyed without interruption for a period of 20 years immediately preceding the action will entitle the claimant to an easement.

The learned counsel for the plaintiffs submitted that the Prescription Act 1832 is a statute of general application in England. It is not confined to any particular class of persons or area. It relates to all types of easements, eg right of easement to light, way, water, pollution etc.

A person claiming an easement under the provisions of the Prescription Act 1832 would still need to satisfy the court of all the common law requirements to establish an easement.

Whereas the common law speaks of a continuous user, the Act mentions 'without interruption' but s 4 of the Act goes on to state that nothing is to be deemed an interruption unless it has taken place for or is acquiesced in for one year. In our case there has been no such interruption for one year.

The learned counsel for the plaintiffs therefore submitted that on the facts relied upon by the plaintiffs they are equally entitled to claim an easement of right of way under the Prescription Act 1832 the user having been enjoyed for more than 20 years calculated for the period immediately preceding this action, ie from 1994 going back to 1968.

I am of the view that the plaintiffs have on the balance of probabilities proved the easement or right of way under the Prescription Act 1832.

Those are the findings by the learned trial judge on easement of right of way to the access road. We are of the view that the learned judge have stated and applied the correct common law principle in the present appeal. We are also of the view that on the evidence as found in the record of appeal, the learned judge came to the correct conclusion when he stated that the respondents had acquired easement of right of way in respect of the access road.

From the record, the original owner of the dominant tenement, Datuk Chow Chee Seng (PW2), gave evidence in court. He stated that he bought the dominant tenement from Mr Tam Weng Lim sometime in 1965. At that time, Mr Tam was also the owner of the servient tenement. Evidence was given that a right of way was registered on the title deed and this was situated at the southern eastern tip of the servient tenement. Both PW2 and Mr Tam Weng Lim realized that it was not possible to build a road on the registered right of way due to the contour and the terrain of the land where the gradient was too steep. When PW2 bought the dominant tenement there was no building on it. Sometime in 1968 PW2 decided to build a house on the servient tenement and engaged Mr Tam Weng Lim as his supervisor. It was then discovered that it was almost impossible to build a road on the registered right of way. A road was needed in order to transport building materials and debris to and from the dominant tenement. Mr Tam Weng Lim then offered the access road to his house on the servient tenement be extended to the dominant tenement. PW2 accepted the offer

and from then onward the road became the access road to both the servient and dominant tenements. There was sufficient evidence to show that PW2, his family and his friends had been using the access road in order to gain entry into the dominant tenement. This went on until 1987 when PW2 sold the dominant tenement to the respondents. From the evidence it was not disputed that from the time they bought the dominant tenement until the problems arose between the appellants and the respondents, the respondents and their friends had been using the same road to gain access to the dominant tenement. Sometime in September 1978, Mr Tam Weng Lim sold the servient tenement to Mr Liu Kai and in April 1983, Mr Liu Kai sold the said land to Datuk Frederick Jinu. Datuk Frederick Jinu in turn sold the servient tenement to the appellants sometime in 1992. There are ample evidence to show that since 1968 until the servient tenement was sold to the appellants, both PW2 and the respondents had been using the same access road to the dominant tenement without any disturbances from the various owners of the servient tenement. There are evidence to show that the respondents were enjoying the use of the access road from 1992 until 1994 or 1995 without any disturbances from the appellants. It was only sometime in 1994 or 1995 that the trouble started between the appellants and the respondents as in the words of the appellants when they discovered that the access road was part of the servient tenement. The evidence of PW2 was confirmed by PW4 (Mr Tam Wah), the brother-in-law of Mr Tam Weng Lim. PW4 gave evidence that he was assisting Mr Tam Weng Lim when PW2 built the house on the dominant tenement. DW5 (Datuk Frederick Jinu) gave evidence that when he was the owner of the servient tenement, the owner of the dominant tenement was not disturbed from using the access road. From the evidence it is clear to us the various owners of the dominant tenement had been enjoying the usage of the access road without any disturbances from the various owners of the servient tenement from 1968 until 1994 or 1995 and this was for a continuous period of 25 years or more. It is also noted that friends of the various owners of the dominant tenement also enjoyed the usage of the access road.

On the other hand, the appellants failed to adduce any evidence to show that the usage of the access road by the respondents and the previous owners of the dominant tenement was without permission of the various owners of the servient tenement. In fact, even after the appellants became the owner of the servient tenement the respondents continued to enjoy the usage of the access road. It was only sometime in 1994 or 1995 that the appellants attempted to stop the respondents from using the road. In our view, when they did that it was done arbitrarily without even considering the long usage of the access road by the respondents and the previous owners of the dominant tenement. Even though the appellants have no knowledge that the access road was on the servient tenement, this in our view did not give them the right to stop the respondents the usage of the road. When the appellants purchased the servient tenement, they purchased it with all the encumbrances on the land, whether with their knowledge or otherwise. This has been illustrated in *Ohna Mohamed Abubakar v Tho Yan Poh & Ors*. It is clear to us the encumbrances on the servient tenement, ie the access road

had been treated as an access road to the dominant tenement, had been there before the appellants bought the land. It is an encumbrance attached to the servient tenement which could not be cured by a mere purchase of the land. It is not a right where a new owner of the servient tenement can take away. As such when the appellants wanted to take away that right, the owners of the dominant tenement have every right to come to the court to protect that right.

On the evidence before us, we agree with the learned judge in the court below that the respondents had established long usage in respect of the access road. That being the case, under the common law the respondents are entitled to claim easement in respect of the access road because there are no provisions in respect of easement under the Ordinance. The appellants cannot deprive the respondents of that right.

We are of the view that on the facts and the law, the learned judge came to the right conclusion. We find that he has not erred in his finding that the respondents have acquired easement of right of way in respect of the access road. The appeal is hereby dismissed with costs. Deposit to be paid to account of taxed costs.

My learned brother, Abu Mansor Ali JCA, who has the opportunity of reading this judgment in draft, has expressed his concurrence with this judgment.

Appeal dismissed.

Reported by Jafisah Jaafar